IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-786

FRED R. ROSS and
STATE OF NORTH CAROLINA,

*Petitioners,*

v.

CLAUDE FRANKLIN MOFFITT,

*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether the due process and equal protection clauses of the Fourteenth Amendment require the State of North Carolina to furnish assistance of counsel to indigent defendants to petition the Supreme Court of North Carolina for a writ of certiorari to review a

decision of the North Carolina Court of Appeals, and to petition the United States Supreme Court for a writ of certiorari to review a decision of the North Carolina Supreme Court.

2. Whether the possibility that North Carolina's arbitrary denial of counsel to indigent defendants after the first appeal violates the equal protection clause of the Fourteenth Amendment requires an evidentiary hearing in the district court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV §1.

"* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina G.S. §7A-31.

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court

(1) The subject matter of the appeal has significant public interest or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

North Carolina G. S. §7A-451

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any felony case * * * *
(3) A post-conviction proceeding under Chapter 15 of the General Statutes.

* * * *

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical state of the action or proceeding, including, if applicable:

* * * *

(6) Direct review of any judgment or decree, including, review by the United States Supreme Court of final judgments or decrees rendered by the highest court of North Carolina in which decision may be had.

## STATEMENT OF THE CASE

### I.

**FOURTH CIRCUIT COURT OF APPEALS No. 72-2480 (Mecklenburg County Conviction).**

In 1970 after a plea of not guilty, respondent Moffitt was convicted of forgery and uttering a forged instrument in the Mecklenburg County (North Carolina) Superior Court. On appeal the conviction was affirmed by the North Carolina Court of Appeals. *North Carolina v. Moffitt*, 9 N.C. App. 694, 177 S.E.2d 324 (1970). At trial and on appeal Moffitt was represented by court-appointed counsel. His lawyer informed Moffitt by letter that he had approached the Superior Court about getting appointed to take Moffitt's case to the North Carolina

Supreme Court but had been informed that no such right to counsel existed.

> I also approached the Superior Court about their appointing me to appeal your case from the North Carolina Court of Appeals to the Supreme Court of North Carolina. The Court stated that they did not have to furnish you with an appeal to the Supreme Court, all that is required under Federal decisions being that they furnish you with only one appeal.[1]

In December of 1970 Moffitt unsuccessfully sought relief under state post-conviction procedures, wherein he alleged several grounds for relief, but failed to raise the issue of denial of his right to counsel to seek review of his conviction in the North Carolina Supreme Court. That issue was first raised in the United States District Court for the Western District of North Carolina by application for federal habeas corpus on February 26, 1971. Habeas Corpus relief was denied and Moffitt appealed. By stipulation of counsel, the appeal was dismissed in the Fourth Circuit to allow Moffitt to exhaust state remedies as to the issue of right to counsel in the North Carolina Supreme Court.

After so exhausting his state remedies Moffitt again sought federal habeas corpus relief in the United States District Court for the Western District of North Carolina. The application was denied by order on November 29, 1972, (A. p. 9) and Moffitt appealed to the United States Court of Appeals for the Fourth Circuit which found that failure to provide Moffitt with counsel to seek review in the North Carolina Supreme Court constituted a denial of due process and equal protection under the Fourteenth

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[1] See p. 36a, Appendix to Moffitt's brief filed in the Fourth Circuit Court of Appeals.

Amendment. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973).[2]

II.

**FOURTH CIRCUIT COURT OF APPEALS No. 72-1720 (Guilford County Conviction).**

In 1970, after a plea of not guilty, Moffitt was convicted of forgery and uttering a forged instrument in the Guilford County (North Carolina) Superior Court. The conviction was affirmed on appeal to the North Carolina Court of Appeals, *North Carolina v. Moffitt*, 11 N.C. App. 337, 181 S.E.2d 184 (1971). Moffitt's attorney from the office of the Greensboro, North Carolina, public defender's office (who represented Moffitt at trial and on appeal) then petitioned by way of certiorari for review of his conviction in the North Carolina Supreme Court. Certiorari was denied. *North Carolina v. Moffitt*, 279 N.C. 396, 183 S.E.2d 247 (1971). The Public Defender, however, did not petition for writ of certiorari in this Court.

On April 11, 1972, Moffitt filed a petition for federal habeas corpus relief on the ground that he was denied assistance of counsel to seek review in the "next highest court" from the North Carolina Supreme Court.[3] Relief was denied by the United States District Court for the Middle District of North Carolina. (A. p. 7). On appeal the Fourth Circuit found that failure to provide Moffitt with counsel to seek review by way of certiorari in the United States Supreme Court constituted a denial of due

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[2]The opinion appears at pp. 12-24 of the printed petition for writ of certiorari filed in this case on November 15, 1973.

[3]See p. 7a, Appendix to Moffitt's brief filed in the Fourth Circuit Court of Appeals.

process and equal protection under the Fourteenth Amendment. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973).[4]

## SUMMARY OF ARGUMENT

Moffit, as an indigent criminal defendant, was denied due process and equal protection of the laws, as construed under the Fourteenth Amendment, when he was denied assistance of counsel in the "Mecklenburg County" case to seek review of his conviction in the North Carolina Supreme Court after his conviction had been affirmed on appeal to the intermediate appellate court, the North Carolina Court of Appeals. Moffitt likewise was denied due process and equal protection of the laws when he was denied assistance of counsel in the "Guilford County" case to seek review of his conviction in the United States Supreme Court after his conviction had been affirmed by the North Carolina Court of Appeals and certiorari denied by the North Carolina Supreme Court.

In *Douglas v. California*, 372 U.S. 353 (1963), this Court found that due process and equal protection require appointment of counsel for indigents on the first appeal. The equities which require appointment of counsel under the Fourteenth Amendment on first appeals likewise require appointment of counsel (or continuation of the services of counsel) to seek review in the State's highest appellate court in a three-tier court system, and also to seek review in this Court from an adverse decision by the highest state court.

The burden placed on the state is small as counsel is already appointed, under *Douglas*, through the first

[4] See note 2, *supra*.

appeal. He is familiar with the case and, unlike the average indigent defendant, capable of presenting the case for review in the appropriate form and in literate fashion. The obvious boon to the court system in having understandable petitions for certiorari, rather than *pro se* petitions, clearly outweighs this slight additional burden on the state. Indigents, unlike defendants of means, may otherwise not have full and fair review in our criminal appellate system.

In the alternative, if the Court determines that there exists no right to assistance of counsel beyond the first appeal, then the case should be remanded for evidentiary hearing in the district court to determine if the practice of providing counsel to assist some indigents on appeals beyond the first appeal (as in the Guilford County case) and not assigning counsel in others (as in the Mecklenburg County case) violates the equal protection clause of the Fourteenth Amendment. Although the equal protection clause does not demand rigid equality among all persons, it does require that those similarly situated be treated equally.

## ARGUMENT

### I.

**THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT REQUIRE THE STATE OF NORTH CAROLINA TO FURNISH ASSISTANCE OF COUNSEL TO INDIGENT DEFENDANTS TO PETITION THE SUPREME COURT OF NORTH CAROLINA FOR A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE NORTH CAROLINA COURT OF APPEALS, AND TO PETITION THE UNITED STATES SUPREME COURT FOR A WRIT OF CERTIORARI TO REVIEW A DECISION OF THE NORTH CAROLINA SUPREME COURT**

*A sentiment like in kind, though different in degree, is at the root of the tendency of precedent to extend along the lines of logical development.* Cardozo, THE NATURE OF THE JUDICIAL PROCESS 34 (1968 Yale Ed.)

*Douglas v. California*, 372 U.S. 353 (1963), established that due process and equal protection of the laws require that indigent defendants in state criminal prosecutions be afforded assistance of counsel through the first appeal. In the instant case, the questions in issue are those specifically reserved in *Douglas*—whether North Carolina must afford assistance of counsel for an indigent criminal defendant seeking discretionary review by the North Carolina Supreme Court after the North Carolina Court of Appeals sustained his conviction, and whether North Carolina must afford assistance of counsel for an indigent criminal defendant seeking review in this Court after denial of appellate review by the North Carolina Supreme Court. 372 U.S. at 356.

The so-called "three-tier" court system operative in North Carolina[5] resembles in many respects the federal model, and the California system in effect under *Douglas*. 372 U.S. at 354. The Superior Court functions as the criminal trial court for the purposes of appellate review in both felony cases and misdemeanor cases. A criminal defendant sentenced to death or life imprisonment has an appeal of right to the highest state court—the North Carolina Supreme Court. All other appeals from the Superior Court must be taken to the intermediate appellate court—the North Carolina Court of Appeals. N.C. Gen. Stat. §7A-27.[6] From a decision of the North Carolina Court of Appeals sustaining a conviction, a defendant has an appeal of right to the North Carolina Supreme Court when a "substantial question" arising under the Constitution of the United States or of the Constitution of North Carolina is involved, or where there is a dissent by a judge in the North Carolina Court of Appeals. N.C. Gen. Stat. §7A-30.[7] All other cases

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[5] At least twenty-four states now employ an intermediate appellate court system. In 1968 nineteen states had such a system. AMERICAN JUDICATURE SOCIETY, INTERMEDIATE APPELLATE COURTS 3 (Report No. 20, 1968). Counsel is informed by the American Judicature Society that from 1968 to 1973 five additional states adopted the intermediate appellate court system.

[6] §7A-27. *Appeals of right from the courts of the trial division.*—(a) From any judgment of a superior court which includes a sentence of death or imprisonment for life, appeal lies of right directly to the Supreme Court. (b) From any final judgment of a superior court, other than one described in subsection (a) of this section * * * * appeal lies of right to the Court of Appeals.

[7] §7A-30. *Appeals of right from certain decisions of the Courts of Appeals.*—Except as provided in §7A-28 [post-conviction appeals], from any decision of the Court of Appeals rendered in a case (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) In which there is a dissent. * * * *.

decided in the North Carolina Court of Appeals are subject to discretionary review in the North Carolina Supreme Court. N.C. Gen. Stat. 7A-31.[8]

A great majority of criminal defendants proceeding through the North Carolina appellate system take their first appeal to the North Carolina Court of Appeals. Under the prevailing decisions of this Court assistance of counsel to an indigent criminal defendant, such as respondent, is constitutionally requisite through such an appeal. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, supra; and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). If counsel is not appointed beyond the first appeal the indigent criminal defendant must carry on alone to the highest court and, if need be, to this Court. This Court, of course, will appoint an attorney to represent indigent criminal defendants where review is granted. *Doherty v. United States*, 404 U.S. 28, 32 (1971) opinion of Mr. Justice Douglas, (concurring).

This Court in *Douglas* recognized that the due process and equal protection standards of the Fourteenth Amendment do not cease to be applicable after exhaustion of the first appeal. 372 U.S. at 356. See *Burns v. Ohio*, 360 U.S. 252, 257 (1959). The federal practice requires appointment of counsel under the Criminal Justice Act, 18 U.S.C. §3006 A, for indigent federal defendants who desire to seek discretionary review in this Court. *Doherty v. United States*, 404 U.S. 28 (1971) Even though *Doherty* was based on interpretation

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[8] §7A-31. Discretionary review by the Supreme Court.–(a) In any cause in which appeal has been taken to the Court of Appeals * * * [exceptions listed] the Supreme Court may in its discretion * * * certify the cause for review by the Supreme Court * * * *.

of statute, the federal practice has been the traditional harbinger of this Court's notions regarding appointment of counsel in state proceedings. Thus the Sixth Amendment's guarantee of right to counsel in federal trials, *Johnson v. Zerbst*, 304 U.S. 458 (1938), found its way into the Fourteenth Amendment and was made applicable to the states. *Gideon v. Wainwright*, 372 U.S. 339, (1963). The federal practice clearly recognizes the value of appointed counsel for indigents seeking discretionary review by this Court. There is no reason to conclude that state criminal defendants are any more capable of running the gauntlet alone or that their claims are less meritorious than their federal counterparts.

"For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' " *Douglas* supra at 355 citing *Griffin v. Illinois*, 351 U.S. 12 (1956). But no appellate review may be afforded to an indigent where the discretion of the court beyond the first appeal is not invoked. In such cases the same handicap condemned in *Douglas* now looms before the indigent seeking to invoke such discretion without counsel—the reviewing court must still make a determination of merit in proceedings where the defendant is without counsel. See *Douglas, supra*, at 356. "In all cases the duty of the state is to provide the indigent as adequate and effective an appellate review as that given to an appellant with funds. . ." *Draper v. Washington*, 372 U.S. 487, 496 (1963).

As noted by the court below, the defendant's most meaningful review of a criminal trial may lie beyond the first appeal in North Carolina. *Moffitt v. Ross*, 483 F.2d 650, 653 (4th Cir. 1973). The North Carolina Supreme Court is the final arbiter on the interpretation of state common law. The North Carolina Court of Appeals follows the interpretation given the common law by the

higher court, just as the various circuit courts follow this Court in matters of "federal common law" and federal statutory law. Thus, in *North Carolina v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1973), the North Carolina Supreme Court substantially modified the existing common law relating to the elements of the crime of kidnapping and reversed the defendant's conviction of the crime which had been upheld under the former standard by the North Carolina Court of Appeals. *North Carolina v. Dix*, 14 N.C. App. 328, 188 S.E.2d 737 (1972). It cannot be said with any degree of frankness that an indigent defendant under the circumstances would have fared so well alone. (In *Dix* there was a dissent in the North Carolina Court of Appeals, so an appeal of right to the North Carolina Supreme Court was guaranteed. N.C. Gen. Stat. 7A-30.[9] However, had Dix been an indigent, under *Douglas* there was no requirement that counsel be appointed in the North Carolina Supreme Court.)

Seeking discretionary review also involves what one observer has described as a "highly specialized aspect of appellate work."

> Certiorari practice constitutes a highly specialized aspect of appellate work. The factors which the Supreme Court deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge and experience of an indigent appellant, unassisted by counsel. Boskey, *The Right To Counsel In Appellate Proceedings*, 45 Minn. L. Rev. 783, 797 (1961).

Seeking discretionary review in the North Carolina Supreme Court after proceeding through the North Carolina Court of Appeals involves a similar level of

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[9] See note 7, *supra*.

expertise. The standard for accepting review is set out by statute. N.C. Gen. Stat. §7A-31(c):

> (1) The subject matter of the appeal has significant public interest, or
> (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

If counsel is not afforded to assist him, an indigent defendant seeking discretionary review in the North Carolina Supreme Court must attempt to invoke the court's discretion under those standards. He can turn nowhere in the record or briefs to tell him how his case falls into one of the above criteria (with the possible exception of number 3). See *Anders v. California*, 386 U.S. 738, 745 (1967).

This Court can draw on its own experience with respect to *pro se* petitions for certiorari. The complexities of certiorari practice combined with this Court's ever increasing work load give the *pro se* petitioner little chance of success. This Court must either expend an unnecessary amount of time and energy reviewing such petitions or not give the indigent's petition full consideration. Our judicial system is not designed to provide full justice to one who is unable to clearly present his cause–in any court. A petition for writ of certiorari in this Court, or in the North Carolina Supreme Court, concisely setting forth the grounds sought for review, prepared by one with the proper expertise and familiarity with the case, could more quickly be passed upon with substantial assurance that the petitioner's cause had been adequately considered than one which is inartfully prepared by one not versed in the proper terms of art,

applicable rules of law, and, in many cases, one not versed in the rudiments of the English language. *Cf. Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Counsel may even discourage the indigent from proceeding beyond the first appeal where there is no merit, or where another course would be more productive. See also *Anders v. California*, 386 U.S. 738 (1967).

Contrary to the argument made by North Carolina in the instant case, the burden exacted upon the state for continued appointment of counsel beyond the first appeal is small compared to the benefit gained by the defendant and the courts. The attorney in most cases acted as trial counsel and appellate counsel. It is the special skill of the attorney, not his time, that plays the dominant role after trial and the first appeal. The facts are settled for purposes of review and the reviewable issues are limited to those raised on the first appeal. Deciding which issues to bring forward and how to present those issues now becomes the only task. It is that legal skill that is possessed by counsel, and lacking in the ordinary indigent, that makes the present practice so discriminatory. The exercise of this skill, on the other hand, removes the burden of reviewing the indigent's case without benefit of counsel's arguments on behalf of the indigent, a burden heretofore shouldered by this Court and other appellate courts where indigents are not guaranteed representation by counsel. Counsel must be appointed in such cases so that this Court's constitutional duty of providing due process for every defendant who seeks relief regardless of the size of his pocket book may be fulfilled. We may now have reached the time where the higher appellate courts cannot afford to review any such case without counsel first being appointed.

As *Gideon* and *Douglas* attest, financial burden has never been an adequate excuse for failure to provide due

process or equal protection to indigent defendants. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, (1972). The impact of *Gideon - Douglas - Argersinger* on the legal profession has not brought the profession to its knees. The burden imposed by appointment of counsel beyond the first appeal in comparison to these present constitutional requirements appears trifling.

Nor will such a decision by the Court involve a novel practice. Even in North Carolina it is common practice for attorneys to represent indigent defendants beyond the first appeal. As was noted by the court below:

> [D]espite the State's claim that it is not required to provide counsel for permissive appellate procedures, it does so with great frequency. This fact was established by the Assistant Director of North Carolina's Administrative Office of the Courts. It was admitted by counsel for North Carolina during oral argument of these cases. In the Guilford County case, Moffitt, himself, was provided with legal assistance by North Carolina as he sought certiorari in the North Carolina Supreme Court. *Moffitt v. Ross*, 483 F.2d 650, 652 (1973).

The State of North Carolina cannot, therefore, hold up as burdensome a practice which it has instituted voluntarily, although not always with consistency. The State of Tennessee likewise adopted statutory language that provides counsel for indigents proceeding beyond the first appeal. Tenn. Stat. § §40-2018, 40-2020, 40-2021. *Hutchins v. Tennessee*, ____ Tenn.____ ,____ S.W.2d____, 14 Crim. L. Rep. 2396 (1974). "As our legal resources grow, there is a correlative growth in our ability to implement basic notions of fairness. Few of the concepts of due process entertained today were born full blown. They grew." *Moffitt v. Ross*, 483 F.2d 650, 655 (4th Cir. 1973).

Appointing counsel to assist indigents past the first appeal will not require the appointment of new counsel, but merely the continuation of counsel already appointed—one who is familiar with the case and who is, with the expenditure of a small amount of time, capable of fulfilling a function for which indigents are ill-suited and for which our court system is ill-designed. Such counsel most likely represented the defendant at trial and on first appeal. It appears to be the commission of a grievous waste not to direct the counsel who is already familiar with the case and has expended considerable time on the issues, to expend a very small amount of time setting down those issues in a form reviewable by this Court or the North Carolina Supreme Court, and to be available for oral argument in appropriate cases. "[T]he adversary system functions best and most fairly only when all parties are represented by competent counsel." *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972) opinion of Mr. Justice Powell (concurring).

If it is invidious discrimination against indigents to refuse assistance of counsel on the first appeal, then certainly the discrimination is no less invidious on seeking discretionary review in a higher state court or in this Court. That proposition is fully supported by this Court's decision in *Douglas v. California*, supra at 356. Although the notion has been entertained that *Douglas* stands for the proposition that due process and equal protection standards cease to be applicable after the first appeal, see *United States ex rel Pennington v. Pate*, 409 F.2d 757 (7th Cir. 1969) cert. denied 396 U.S. 1042 (1970); *Peters v. Cox*, 341 F.2d 575 (10th Cir.), cert. denied 382 U.S. 863 (1969); the notion has not withstood the "test of time." *Hutchins v. Tennessee*, _____ Tenn. _____, _____, _____ S.W.2d _____, _____, 14 Crim. L. Rep. 2396 (1974).

## II.

## THE POSSIBILITY THAT NORTH CAROLINA'S ARBITRARY DENIAL OF COUNSEL TO INDIGENT DEFENDANTS AFTER THE FIRST APPEAL VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES AN EVIDENTIARY HEARING IN THE DISTRICT COURT.

The court below noted that there was evidence before the court tending to show that assistance of counsel is afforded to a great many indigents beyond the first appeal in North Carolina, and not afforded to others.

> [I]t is relevant to note that, despite the State's claim that it is not required to provide counsel for permissive appellate procedures, it does so with great frequency. This fact was established by the Assistant Director of North Carolina's Administrative Office of the Courts. It was admitted by counsel for North Carolina during oral argument of these cases. In the Guilford County case, Moffitt, himself, was provided with legal assistance by North Carolina as he sought certiorari in the North Carolina Supreme Court. Counsel for North Carolina could suggest no reason why legal assistance was provided Moffitt in seeking certiorari in the North Carolina Supreme Court in the one case, but not in the other. Inquiry was made of the Assistant Attorney General as to the existence of any guidelines to be followed by state judges in deciding whether or not assigned counsel should be provided to assist indigents in seeking permissive review. He responded that he knew of none.
>
> This record provides an insufficient basis for a finding or a conclusion that North Carolina's Administration of her statute works a denial of equal protection of the laws to some indigent

appellants. It may not be amiss, however, to note that such a problem may be lurking in this case, for, if judges of courts whose judgments are sought to be reviewed are deciding whether or not to assign counsel to prepare and file an application for permissive review, and there are no standards or guidelines to govern their determination, it may well be that some indigents are denied the assistance of counsel in situations entirely comparable to those in which other indigents are furnished the assistance of counsel. *Moffitt v. Ross*, 483 F.2d 650, 652 (4th Cir. 1973).

The appropriate North Carolina statute would seem to support the requirement that appointment of counsel in all stages of the appellate process is required, including the filing of a petition for writ of certiorari in this Court. N. C. Gen. Stat. 7A-451 (See p. 2, *supra*). Apparently, because no evidentiary hearing was held in either the Guilford County case or the Mecklenburg County case, the Fourth Circuit was reluctant for purposes of the decision to find sufficient facts in the record to support a finding that the North Carolina practice was constitutionally impermissible.

However, Moffitt urges that if this Court finds that there is no constitutional right to counsel beyond the first appeal under Argument I, *supra*, then the Court should require the district courts to confront the issue of the constitutionality of the North Carolina practice by remanding the case with instructions for an evidentiary hearing on the issue. *Townsend v. Sain*, 372 U.S. 293, 313 (1963); 28 U.S.C. §2254(d). It is elementary that under the Fourteenth Amendment those persons similarly situated must be similarly treated. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); See also, *Baxtrom v. Herold*, 383 U.S. 107, 114-115 (1966).

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed. In the alternative, the cases should be remanded with instructions that an evidentiary hearing be granted in the district courts.

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